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No. 84-548

In the Supreme Court of the United States

October Term, 1984

RAYMOND J. DONOVAN, Secretary of Labor,
U.S. Department of Labor,
Respondent,

vs.

NATIONAL TRANSIENT DIVISION
INTERNATIONAL BROTHERHOOD OF
BOILERMAKERS,
IRON SHIP BUILDERS,
BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO,

and

INTERNATIONAL BROTHERHOOD OF
BOILERMAKERS,
IRON SHIP BUILDERS,
BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the Secretary of Labor has the authority under Title IV of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 401, *et seq.*, to file suit in a United States District Court seeking a determination that members of a division within an international labor organization have the right to have elections within the division and and the right to vote in such elections as guaranteed by Title I of the LMRDA.

Whether a division of an International labor organization which operates in forty-one (41) states and which has no autonomy can be properly characterized as a *local* labor organization within the meaning of the LMRDA.

Whether a District Court may order that an election be held pursuant to Title IV of the LMRDA when compliance with such an order is impossible.

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Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to the United States Court of Appeals for the Tenth Circuit on its judgment entered in this case.

REPORTS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (Appendix A, A1-A11) is reported at 736 F 2d 618. The opinion of the United States District Court for the District of Kansas (Appendix B, A12-A18) is reported at 542 F. Supp. 957.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was dated and entered on June 15, 1984. (Appendix D, A24-A25). Its judgment denying the Petition for Rehearing and Suggestion for Rehearing *en banc* was dated and entered on July 13, 1984. (Appendix E, A26-A27). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant provisions of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401, *et seq.* (1976), which are involved in this case, are set forth in Appendix F (A28-A35). For the convenience of the Court, however, the pertinent provisions of Section 3; Title I, Sections 101 and 102; and Title IV, Sections 401 and 402 are set forth immediately below:

> "(i) 'Labor organization' means a labor organization engaged in an industry affecting commerce and includes any organization of any kind, . . . in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay,

hours, or other terms or conditions of employment, . . ."

29 U.S.C. § 402(i) (1976)

"(a)(1) Equal rights. Every member of a labor organization shall have equal rights and privileges within such organization . . . to vote in elections . . . of the labor organization, . . ."

29 U.S.C. § 411(a)(1) (1976)

"Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located."

29 U.S.C. § 412 (1976)

"(b) Officers of local labor organizations; manner of election. Every local labor organization shall elect its officers not less often than once every three years by secret ballot among the members in good standing."

29 U.S.C. § 481(b) (1976)

"(e) . . . In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 and to reasonable qualifications uniformly imposed) and shall have the right to vote for

or otherwise support the candidate or candidates of his choice, . . . Not less than fifteen days prior to the election notice thereof shall be mailed to each member at his last known home address."

29 U.S.C. § 481(e) (1976)

"(a) Filing of complaint; presumption of validity of challenged election. A member of a labor organization—

(1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or

(2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation,

may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 401 (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall be presumed valid pending a final decision thereon . . ."

29 U.S.C. § 482(a) (1976)

"(b) . . . The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this title has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers

under the supervision of the Secretary and in accordance with the provisions of this title . . ."

29 U.S.C. § 482(b) (1976)

STATEMENT OF THE CASE

On March 29, 1979, the Secretary of Labor filed this action in the United States District Court for the District of Kansas, pursuant to Section 210, 29 U.S.C. § 440, and Section 402(b), 29 U.S.C. § 482(b), of the Labor-Management Reporting and Disclosure Act (hereinafter referred to as LMRDA or Act) alleging that the Defendant National Transient Division (hereinafter referred to as N.T.D.) violated Section 401(b) of the LMRDA, 29 U.S.C. § 481(b), by failing to elect officers once every three years by secret ballot and that the Defendant International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO (hereinafter referred to as International) violated Section 401(e) of the LMRDA, 29 U.S.C. § 481(e), by failing to ensure that N.T.D. members were afforded the right to nominate and elect officers. Also, the Secretary alleged that both Defendants International and N.T.D. violated Sections 201(a) and (b) and 207(b), 29 U.S.C. §§ 431(a) and (b) and 437(b), by failing to file with the Secretary of Labor, copies of a constitution and bylaws for the N.T.D. as well as other organizational and financial reports. The Defendants denied and strenuously opposed these contentions arguing, *inter alia*, that the N.T.D. is not a "local labor organization" as defined in the Act.

The International Brotherhood is divided into five divisions which are: the Construction Division, the Railroad Division, the Maritime Division, the Industrial Division, and the National Transient Division. Each of these divi-

sions roughly equates with the areas of work performed by Boilermakers. Each of these divisions is essentially the same in make-up, operation, staffing and authority. None of the directors of any of these divisions has ever been elected. Each of these divisions functions basically through International Representatives who, like the Director of the division, are appointed by the International President. The Plaintiff, and his predecessors, have never contended that any of these other divisions of the International Brotherhood constitutes a separate labor organization.

The N.T.D. operates in forty-one states. It consists of Boilermakers who perform work principally in the steel plate erection industry. The N.T.D. members travel constantly. Most N.T.D. jobs are of short duration, and the employees usually travel hundreds of miles from one job to the next. The employees never know from one week to the next where they may be working. The employees generally travel from job-to-job with their employers.

The International Constitution contains certain provisions regulating the operation of local lodges affiliated with the International Brotherhood. The International Constitution requires local lodges to hold regularly scheduled monthly meetings at which all members are afforded an opportunity to attend and participate. It further requires local lodges to hold elections at least once every three years and to send notice of nominations to the members fifteen days before the nominations are due, and to send election ballots to the members thirty days before the ballots are due.

The local lodges affiliated with the International Brotherhood have no difficulty in complying with these constitutional provisions for monthly meetings and holding of local lodge elections. Between seventy and ninety-five

percent of the members of local lodges generally vote in local lodge elections.

The evidence adduced at the trial, including the depositions which were spread upon the record, indicates that it would be a physical impossibility for the N.T.D. to have any type of monthly meeting at which even a small percentage of the members would have an opportunity to attend and participate. This is because of the transitory nature of the work, and the fact that the members are constantly on the move. The evidence also indicates that, despite tremendous efforts by the N.T.D. business office to maintain addresses on the members, it is impossible to maintain an up-to-date mailing list, and that the N.T.D. cannot assure that it can get ballots to even one-half of its members within thirty days of an election.

In 1981, members of the N.T.D. were allowed to nominate and elect delegates to the International Brotherhood's 1981 convention. This nomination and election of delegates was conducted in conformity with an agreement reached with the Department of Labor. The evidence demonstrates that only fourteen percent of the N.T.D. members voted for delegates to the convention.

The Department of Labor made no proposal or suggestion as to how the N.T.D. could conduct election of officers which would comply with the International Brotherhood's Constitution or with the Act and the Plaintiff's regulations. Quite simply, the Department of Labor did not even suggest to the District Court or the Appellate Court any manner in which the N.T.D. could conduct a lawful election of officers.

The N.T.D. differs markedly from Boilermaker Construction locals. Boilermaker Construction locals all operate exclusive hiring halls. The N.T.D. does not and can-

not operate in such a manner. The local lodges have no jurisdiction outside of their defined geographical territory; whereas the N.T.D. operates throughout the forty-one states. The wages of N.T.D. members are determined by the wages negotiated by the various Construction locals. However, no Construction local has the authority to determine the wages of the members of any other Construction local affiliated with the International Brotherhood.

Considerable testimony was adduced from N.T.D. contractors who indicated that the N.T.D. cannot be operated as a local, and that they could not operate as union contractors if they were required to man their N.T.D. jobs with Boilermakers from Boilermaker Construction local lodges. They forecast dire consequences for their industry, and for the members of the N.T.D., if the Court were to hold that the N.T.D. is a local and ordered it to operate as such.

No election of officers has ever been conducted among the members of the N.T.D. The Defendants took the position that the Court lacked jurisdiction under Title IV of the Act to entertain this suit because no election had been conducted. It has consistently been the position of the Defendants that the appropriate vehicle for determining whether or not an election should have been conducted among members of the N.T.D. is a suit under Title I by members of the Boilermakers. The Defendants moved to dismiss for lack of jurisdiction based upon this argument. That Motion was denied by the District Court. The District Court ruled that:

> ". . . the Secretary may bring an action under §482 to enforce the provisions of §481(b), which require elections to be held every three years. We find further support in the language of §482(b), 'to set aside the

> invalid election, *if any.*' [Emphasis added]. Congress obviously contemplated that at certain times, no election would be held and the Secretary would be required to bring suit 'to direct the conduct of an election.' §482(b)."

Marshall v. National Transient Division, et al., Memorandum and Order filed Dec. 31, 1981 (A21). Defendants renewed their Motion at the trial, and it was again overruled.

A trial to the United States District Court for the District of Kansas was held on June 6, 7 and 8, 1982. On July 15, 1982, the District Court issued its judgment holding that the N.T.D. was a "national labor organization" within the meaning of the LMRDA thereby requiring the N.T.D. to hold elections every five years by either direct election through secret ballot or at a convention of delegates chosen by secret ballot, pursuant to Section 401(a), 29 U.S.C. § 481(a), of the Act. In so ruling, the Court found that:

> "The evidence points out that NTD is not a local labor unit. The word 'national' in its title clearly defines the geographical boundaries of NTD. The transient nature of the work necessitated the shift of NTD from a Chicago local to a national organization. Despite the similarities in function, the Court cannot find that NTD is a 'local' labor organization."

Donovan v. National Transient Division, et al., 542 F. Supp. 957, 960 (D. Kan. 1982) (A17).

Both the Plaintiff and the Defendants appealed to the United States Court of Appeals for the Tenth Circuit. Oral arguments were presented by both parties before the Court of Appeals on September 13, 1983. On June 15, 1984, the Court of Appeals for the Tenth Circuit rendered

its ruling which affirmed in part and reversed in part the decision of the District Court. The Court of Appeals found that the District Court had subject matter jurisdiction over the action, because "the text of the statute clearly indicates that Congress contemplated an action pursuant to § 482 when a labor organization fails to conduct an election." *Donovan v. National Transient Division, et al.*, 736 F.2d 618, 620 (10th Cir. 1984) (A5). The Court relied on decisions of other Courts which found jurisdiction under 29 U.S.C. § 482 for actions brought when a union failed to conduct an election within the time limits which 29 U.S.C. § 481 prescribes.

The Court of Appeals affirmed the decision of the District Court that the Defendant N.T.D. was a labor organization within the meaning of 29 U.S.C. § 402(i). However, the District Court's ruling that the N.T.D. was a "national labor organization" was reversed on appeal. The Court of Appeals characterized the N.T.D. as a "local labor organization." The Court stated:

> ". . . it makes little sense to focus exclusively on the geographical proximity of the organization's membership in determining whether a labor organization is a local within the meaning of § 481. Rather, congressional intent indicates that the focus should be on the relationship between the organization and its members . . . Given its structure and functions, we find no reason to reject the Secretary's characterization of NTD as a local labor organization."

Id. at 623 (A9-A10).

The Court of Appeals also rejected the Defendants' argument that compliance with the election requirements of 29 U.S.C. § 481 would be impossible if the N.T.D. were characterized as a labor organization within the meaning of 29 U.S.C. § 402(i). The Court stated:

> "The LMRDA contains no exception for instances in which compliance with these requirements is difficult, and we are unwilling to imply one given the clear congressional mandate. *Cf. Wirtz v. Local Union No. 1622*, 285 F. Supp. 455, 465 (N.D. Cal. 1968) (Congress did not give courts the power to determine whether election would serve the public interest). Moreover, defendants have not shown that NTD is unable to comply with the Act's election provisions Section 481(e) merely requires that the labor organization mail notice of the election to its members at their last known home address; it does not require that the notice actually reach them."

Id. (A11).

REASONS FOR GRANTING THE WRIT

I. The Question Presented By The Petition Is One Of Major Significance In The Administration Of The Labor-Management Reporting And Disclosure Act And Involves A District Court's Granting Power To An Executive Agency Beyond That Which Is Provided By Congress.

The District Court held and the Court of Appeals affirmed that the District Court had jurisdiction under Title IV of the LMRDA to hear the Secretary's Complaint and to direct the conduct of an election. However, Title IV does not confer upon union members rights which they have not previously enjoyed. *Ragland v. United Mine Workers of America*, 188 F. Supp. 131 (N.D. Ala. 1960). Although the N.T.D. has been in existence for almost forty years, N.T.D. members have never voted for officers in an election. This is because the International Brotherhood

has never considered the N.T.D. to be a separate labor organization.

The question of whether N.T.D. members are entitled to elect officers must be resolved under Title I. Sections 101(a)(1) and 102 of the LMRDA, 29 U.S.C. §§ 411(a)(1) and 412, read, in pertinent part, as follows:

> "Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organizations, to attend membership meetings and to participate in the deliberations and voting upon the business of such meetings . . .
>
> * * *
>
> . . . Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate . . ."

The Secretary of Labor has no authority to file suit to remedy an alleged deprivation of Title I rights. Yet, that is exactly what happened here. Distilled to its essence, the Secretary's claim is that N.T.D. members do not have the right to nominate candidates and vote in elections as do other members of the International Brotherhood. This clearly is a claimed violation of § 101(a)(1), 29 U.S.C. § 411(a)(1); and, only those union members whose rights have been infringed by the alleged violation may sue to remedy it.

The Secretary only has authority to file suit under Title IV, once the Title I right to an election has been determined. But here, the Title I questions have never been resolved. Therefore, the Title IV suit was premature.

To hold otherwise is to rule, in direct contravention of § 102, 29 U.S.C. § 412, that the Secretary may sue to remedy infringement of Title I rights. Therefore, the District Court lacked jurisdiction to entertain the Secretary's complaint because it seeks to vindicate alleged Title I rights.

The legislative history of Title I indicates that all pre-election conduct, including the determination of the appropriateness of an election, is to be attacked by suits under Title I. Prior to the enactment of Title I, state law provided the principal protection for union members prior to an election. *Local No. 82, Furniture and Piano Moving v. Crowley,* 104 S.Ct. 2557, 2567, fn. 18 (1984). When Title I was originally introduced, the legislative purpose behind it was to substitute a federally protected right for the rights normally governed by state law. However, the original Title I proposal sought enforcement of those rights by the Secretary of Labor. This proposal was amended to provide for enforcement of Title I rights through suits by the individual union members only. The Kuchel Amendment which provided for individual enforcement of Title I rights explicitly eliminated from Title I the right of the Secretary to sue in the individual's behalf.

It is respectfully submitted that the lower Courts have failed to properly classify this suit as a Title I suit. The Appellate Court relied on *Marshall v. Local Union 1374, International Association of Machinists,* 558 F.2d 1354 (9th Cir. 1977); and *Hodgson v. Union de Empleados de los Supermurcados Pueblo,* 388 F. Supp. 1026 (D. P.R. 1974), in asserting that other Courts have upheld actions under Title IV when a union failed to hold an election within the time limits prescribed by § 401 of Title IV, 29 U.S.C. § 481. However, in each of these cases the right to have

an election had already been established. Section 402(b) of Title IV, 29 U.S.C. § 482(b), gives the Secretary the right to bring suits to correct violations of Title IV. However, Title IV does not require elections; it merely prescribes the time limits within which elections must be conducted, once the Title I right to have an election has been established.

The basic right to an election is grounded on Title I concerns. As noted above, Title I provides that "every member of a labor organization shall have equal rights and privileges within such organizations . . . to vote in elections or referendums of a labor organization . . ." 29 U.S.C. § 411(a)(1) (1976). The legislative history of Title I indicates that the Secretary has no right to file suit on behalf of any individual to enforce these rights. Therefore, if the right to "vote in elections or referendums of the labor organization" is asserted, it is a right which must be asserted under Title I and, which cannot be litigated by the Secretary in a Title IV action.

The effect of the Appellate Court's decision is to broaden the power of the Secretary far beyond that which is delegated by Congress in the LMRDA. The Supreme Court has unequivocally stated that it is the province of a court to expound upon the law, not to make the law and thus, the court must administer the law as the court finds it. *Luther v. Borden*, 98 U.S. (7 How.) 1 (1849). Furthermore, where the legislative purpose in refusing to alter the scope of legislation is "so plain", the courts are powerless to "assume to do that which Congress has refused to do." *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942). As the Supreme Court has stated,

> "Just as '[w]e are not at liberty to seek ingenious analytical instruments' to avoid giving a congressional

> enactment the broad scope its language and origins may require, *United States v. Price*, 383 U.S. at 801, 16 L.Ed.2d 267, so too are we not at liberty to recast this statute to expand its application beyond the limited reach Congress gave it."

District of Columbia v. Carter, 409 U.S. 418, 432 (1973).

The lower courts have provided the Secretary of Labor the power not only to enforce the substanitve right to an election, if there is any, but also to decide whether in the first instance there is the existence of the right to an election. It is only Title I which gives an individual union member the right to vote in an election. Congress has stated that these rights are to be enforced by suits brought by the individuals and that the Secretary does not have the right to file a suit on behalf of these individuals to enforce these Title I rights. However, in this case the lower courts disregarded the Congressional mandate prohibiting the Secretary of Labor's involvement in the protection of these Title I concerns and have "assumed to do", in expanding the power of the Secretary beyond the Title IV limits imposed by Congress, that which Congress had refused to do. Therefore, the Secretary did not have the right to bring this suit and the District Court did not have jurisdiction to hear the matter.

II. The Question Presented By The Petition Is One Involving An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court; Namely, Whether A Division Of An International Labor Organization, Which Operates In Forty-One States, Is A Separate And Autonomous Local Labor Organization.

Section 3(i) of the Act, 29 U.S.C. § 402, defines a labor organization as any organization in which employees

participate and which exists for the purpose in whole or in part of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment. Thus, the statute sets out a two-pronged test for determining whether or not an entity is a labor organization. First, the entity must be an organization in which employees participate; second, the entity must deal with employers concerning terms and conditions of employment.

Participation generally takes the form of attending meetings and direct contact with the entity. Sayles and Strauss, *The Local Union*, 93, 146 (Harcourt, Brace & World 1967). However, N.T.D. members are not able to participate in the N.T.D. because of the transient nature of their work, which requires them to travel long distances on short notice resulting in great fluctuations in the numbers of members in any given area.

There was no evidence presented at the trial concerning the "participation" nexus with the N.T.D. Consequently, there was no finding of fact by the District Court that the N.T.D. was an organization in which employees participated. However, the Court of Appeals, in its decision, summarily held that the "N.T.D. holds meetings in which its members participate" and thus, "the evidence clearly shows that the N.T.D. is an organization in which employees participate." *Donovan v. National Transient Division, et al.*, 736 F.2d 618, 622 (10th Cir. 1984) (A8).

A Court of Appeals has limited authority to make its own findings of fact and decide the appeal, notwithstanding the absence of specific findings of fact by the trial court, where a full understanding of the issues presented to the trial court can be garnered from the record. See, *United States v. One 1966 Volkswagen 2-Door Sedan*, 490

F.2d 381, 383 (3rd Cir. 1973). However, if an appropriate review by the Court of Appeals is not possible because of the District Court's failure to make findings; and, if the reviewing court is in doubt as to just what the trial court believed the facts to be, and thus, is left to speculate as to the basis for judgment, the Court of Appeals must remand the case and direct the lower court to make findings. *Nickerson v. Travelers Insurance Co.*, 437 F.2d 113 (5th Cir. 1971). Here, a factual determination that members of the N.T.D. participated in the organization as required by Section 3(i) of the Act, 29 U.S.C. § 402(i), was critical to a finding that the N.T.D. is a labor organization as defined in Section 3(i), 29 U.S.C. § 402(i). The absence of such a finding was clear error by the trial court.

Moreover, such a finding made by the Court of Appeals constitutes a clear error in that there is no factual basis for such a finding. As noted above, the record is barren of any evidence that the N.T.D. members participate in the division. Furthermore, the N.T.D. does not conduct any meetings, and thus, the Court of Appeals conclusion that the "N.T.D. holds meetings in which its members participate" is clearly erroneous. Therefore, the Court of Appeals could not rely on the trial court record in concluding that the N.T.D. members participated because of the absence of any evidence of participation. Thus, the Court of Appeals was forced to *speculate* that the basis of the trial court's judgment was that the N.T.D. members participated by attending N.T.D. meetings. However, such speculation is without foundation in fact because the record is devoid of any indication that the N.T.D. conducted any meetings. Therefore, the Court of Appeals should not have speculated about the facts, but rather, should have remanded the case to the trial court to make specific findings.

A lower court's finding is "clearly erroneous" when, although there is evidence that supports it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978). Here there is no evidence whatsoever to indicate that N.T.D. members participate within the division. Thus, any finding by the Court of Appeals that the participation nexus of the "labor organization test" has been met is a mistake and clearly erroneous.

The N.T.D. was established by the International Brotherhood to effectuate the "common program" for the "whole industry" consisting of transitory members. It was not established as an entity separate and apart from the International. It was designed to assist in representing the transitory members of the Brotherhood.

The effect of the District Court's decision and the Court of Appeals affirmance is to put all divisions of national labor organizations on notice that they may be considered separate labor organizations in and of themselves and subject to all federal requirements accordingly. Such a ruling provides the judiciary system with carte blanche authority to interfere with the internal structure of labor organizations, in direct contravention of principles previously recognized. As the Tenth Circuit Court of Appeals stated in *Williams v. International Typographical Union*, 423 F.2d 1295, 1297 (10th Cir.), *cert. denied*, 400 U.S. 824 (1970):

> "We believe that Congress did not intend the Act to be an invitation to the Courts to intervene at will in the internal affairs of unions and that general supervision of unions by the Courts would not contribute to the betterment of unions or their members or to the cause of labor management relations."

Unfortunately, if the lower courts' decisions were allowed to stand, such would be the natural and inevitable consequence.

The majority of the evidence presented at the trial was presented in rebuttal to the Plaintiff's claim that the N.T.D. is a local labor organization. It indicates that the N.T.D. is not a local.

Title IV of the Act recognizes three basic groups of labor organizations: locals, intermediate bodies, and nationals/internationals. The N.T.D. is none of these. It is a division of the International, the same as the other four divisions. Only the government would claim that a division operating in forty-one states is a local.

Very little discussion can be found in the decisional law concerning the nature and make-up of local labor organizations. However, general treatises on the subject indicate the following. Local labor unions are considered the basic unit of a national labor organization, and are recognized for their relatively simple structure. Lahne, *The Local Union: A Regulatory Problem,* 12 Lab.L.J. 1115, 1130 (1961). "The basic unit is the local, which may include only the employees in a single large plant or extend to numerous small employers in a defined geographical area." Bok and Dunlop, *Labor In The American Community,* 150 (Simon and Schuster 1970). The most prevalent characteristic of a local labor organization is its concentration in representing workers of ". . . bargaining units located within close geographical proximity." Goldman, *Labor Law And Industrial Relations In The U.S.A.,* 182 (Kluwer Deventer 1979). The members of a local are "geographically close to only the local." Sloane and Witney, *Labor Relations,* 171 (Prentice Hall, Inc., 3d Edition 1977).

The Court of Appeals appeared to be under the mistaken impression that the lack of geographic proximity is the only difference between the N.T.D. and other local labor organizations, affiliated with the International Brotherhood. This, of course, is not true. The evidence is overwhelming, and uncontradicted, that the N.T.D. cannot conduct monthly meetings or otherwise afford the members of its division an opportunity to participate in the affairs of the division in any way similar to the participation available to members of Boilermaker local unions. The monthly meeting is probably the singular most important aspect and characteristic of a local labor organization. The local union monthly meeting is "the sovereign assembly which governs its affairs." Sayles and Strauss, *supra*, at 146. Because of the important nature of the local meeting, labor officials are constantly attempting to achieve a high membership turnout at the meetings. Sloane and Witney, *supra*, at 179.

Thus, as the authors indicate, a local labor organization can be recognized by its close geographic proximity to the membership and by its conducting monthly meetings to bring the membership together to discuss business relevant to the needs and interests of the members as a whole. These are the two most prevelant characteristics of a local labor organization. Obviously, the N.T.D. does not and cannot possess either of these attributes. Because of the transitory nature of the work, there is no location at which an N.T.D. office or local could be set up which would maintain close proximity to even a sizable minority of the members. Quite simply, there is no geographic proximity between the N.T.D. and the members. Furthermore, as has been unequivocally established, it is a physical impossibility for the N.T.D. to conduct meetings at which members would have an opportunity to attend and participate. Yet,

this is one of the cornerstones of a local labor organization.

As noted above, there is simply no evidence that members of the National Transient Division can participate in any manner in the affairs of the N.T.D., as do members of a local union. Accordingly, the evidence stands uncontradicted that the N.T.D. is not, and cannot operate as, a local union. Therefore, the District Court correctly ruled that the N.T.D. is not a local labor union and its decision in that regard should be reinstated.

The evidence also stands uncontradicted that the N.T.D. differs markedly from the Boilermaker construction locals to which it has been compared incorrectly by the Plaintiff. As noted above, all Boilermaker construction locals operate exclusive hiring halls and are required to comply with the National Joint Referral Rules. Thus, all members of Boilermaker construction locals can only seek employment by being referred from their local hall's out-of-work list and are not free to solicit employment directly from employers; nor are they free to travel from job-to-job with their employers. The opposite is true with the N.T.D. N.T.D. members are not required to obtain job referrals; instead, they are free to solicit employment directly from N.T.D. contractors and they travel from job-to-job with their employers.

Plaintiff anchored his contention that the N.T.D. is a local principally upon the fact that International Representatives assigned to the National Transient Division have some duties and responsibilities in common with Business Managers and Business Agents of local lodges. While there are some similarities between the two, the differences far outweigh them. Furthermore, the evidence conclusively demonstrates that the International Represen-

tatives assigned to the National Transient Division have much more in common with the International Representatives assigned to the Construction Division, as well as their counterparts in the other divisions of the International Brotherhood, than they do with the Business Agents of local lodges. As noted above, the National Transient Division Representatives and Construction Division Representatives both serve under directors of their respective divisions; all are appointed by the International President; and, they all perform exactly the same duties and functions. Yet, the government has never contended that the Construction Division, or any of the other divisions, of the International Brotherhood is a labor organization or that Title IV of the LMRDA requires that its Representatives be elected.

The Secretary has contended that his determination that the N.T.D. is a local labor organization is entitled to deference. In support of this proposition, Plaintiff cited, *inter alia, North Haven Board of Education v. Bell,* 456 U.S. 512 (1982), where the Supreme Court stated, in pertinent part:

> "In construing a statute, this court *normally* accords great deference to the interpretation, particularly when it is long-standing, of the agency charged with the statute's administration." (Emphasis added).

The Defendants submit that the Secretary's proffered interpretation in this case is entitled to no deference. As the foregoing quote demonstrates, the rule of according deference to an administrative agency's interpretation is not automatic. Furthermore, as is evident from the testimony of Alva Jones, the only witness called by the Plaintiff at trial, the Secretary's determination that the N.T.D. is a local labor organization is not a long-standing inter-

pretation. Indeed, this is a case of first impression and the Secretary's determination has only been recently made notwithstanding the fact that the N.T.D. has been in existence for nearly forty (40) years. The Defendants submit that when the testimony of the only government witness who testified is analyzed, it is clear that the Secretary's interpretation should be accorded no deference whatsoever.

Mr. Jones testified in a most conclusory manner as to the skeletal investigation done by his office before he reached the interpretation[1] that the N.T.D. is a local. Yet, Mr. Jones did not conduct a complete investigation before reaching his unsupported conclusion. Even though the Defendants contend that the N.T.D. is a Division of the International Brotherhood, like the other four Divisions, Jones admitted that he was not aware of the functions of any of the Divisions of the International Brotherhood, nor the duties of any of the International Representatives assigned to those Divisions. He did not know whether or not N.T.D. International Representatives had the same duties, responsibilities and positions as the International Representatives assigned to the other Divisions. By contrast, extensive testimony was introduced by the Defendants which demonstrated conclusively that the N.T.D. International Representatives are virtually identical in function, purpose and duties as their counterparts in the other Divisions, and that they have very little in common with the Business Agents in construction locals. This is most important because no one, including the Secretary of Labor, has ever contended that any of the other Divisions of the

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1. Of course, the Secretary of Labor has not actually made a determination in this case. The statutory interpretation urged here by the Plaintiff was actually made by his Area Administrator, Mr. Jones.

International Brotherhood is a labor organization. The evidence shows that the N.T.D. is exactly what it claims to be, a division, and not a local.

In *Illinois Malleable Iron Company*, 127 N.L.R.B. 1509 (1960), supplemental opinion, *Appleton Electric Co.*, 129 N.L.R.B. 1347 (1961), *enf. denied on other grounds sub nom., N.L.R.B. v. Appleton Electric Company*, 296 F.2d 202 (7th Cir. 1961), the National Labor Relations Board ruled that the foundry department of the United Auto Workers was an "administrative arm" of the U.A.W. and, thus, not a "labor organization." The foundry department assisted the U.A.W., *inter alia*, in the organization of unorganized foundries and assorted "foundry problems." The NLRB ruled that the foundary department was "an internal and administratively created part of the international" and, thus, was not a separate labor organization. 127 N.L.R.B. at 1510. The Defendants submit that this Court should make the same finding with regard to the National Transient Division.

The Tenth Circuit's principal criticism of the District Court's finding that the N.T.D. is not a local was that the District Court overemphasized the fact that local unions are confined to limited geographic areas. It states that the District Court instead should have analyzed the structure of the N.T.D. and then should have concluded that it was similar to a local. Of course, this ignores all of the evidence in the record which indicates that structurally the N.T.D. is exactly the same as the other Divisions of the International Brotherhood. Yet, in the only case cited by the Plaintiff for this proposition, *Schultz v. Employees' Federation*, 74 L.R.R.M. (BNA) 2140, 2143 (S.D. Tex. 1970), the Court specifically held that the labor organization involved was "a single independent union whose membership is limited to employees of one division of a single employer with-

in a limited geographic area." Thus, the factor which the Plaintiff contends should not be considered (geographic proximity) in this case was a paramount factor to the Court in the *Schultz v. Employees' Federation* case, the only case upon which Plaintiff relied for his contention.

The evidence clearly indicates that the N.T.D. is not a local labor organization. The Court of Appeals erred when it disregarded that evidence.

Furthermore, the N.T.D. cannot meet the requirements of the International Constitution for the operation of a local or for the conduct of the election which the Plaintiff seeks. Therefore, by sustaining Plaintiff's claim that the N.T.D. is a local labor organization which must conduct elections, the Court of Appeals effectively rewrote the Constitution of the International Brotherhood. However, the Court has no authority to do so. *United Brotherhood of Carpenters & Joiners v. Sidell*, 552 F.2d 1250 (7th Cir.), *cert. denied*, 434 U.S. 862 (1977); *Vestal v. Hoffa*, 451 F.2d 706 (6th Cir.), *cert. denied*, 406 U.S. 934 (1971); *Cleveland Orchestra Commission v. Cleveland Federation of Musicians*, 303 F.2d 229 (6th Cir. 1962); *Strong v. Sheet Metal Workers International Association*, 90 L.R.R.M. (BNA) 2795 (N.D. Cal. 1974); *Local 6256 v. United Mine Workers of America*, 87 L.R.R.M. (BNA) 2191 (N.D. Ala. 1973), *aff'd without opinion, United Mine Workers Local 6256 v. United Mine Workers*, 491 F.2d 1406 (5th Cir. 1974). For, as the Second Circuit stated in *Gurton v. Arons*, 339 F.2d 371 (2d Cir. 1964), "the provisions of the LMRDA were not intended by Congress to constitute an invitation to the Courts to intervene at will in the internal affairs of unions."

Likewise, in *Schuchardt v. Millwright and Machinery Erectors Local Union No. 2834*, 380 F.2d 795 (10th Cir.

1967), the Tenth Circuit stated that the Act does not purport to project absolute judicial control into the internal management of unions. And, it also stated in *Williams v. International Typographical Union*, 423 F.2d 1295 (10th Cir.), *cert. denied*, 400 U.S. 824 (1970):

> "We believe that Congress did not intend the Act to be an invitation to tne Courts to intervene at will in the internal affairs of unions and that '[g]eneral supervision of unions by the Courts would not contribute to the betterment of unions or their members or to the cause of labor management relations.' "

Id., at 1297, quoting *Gurton v. Arons*, 339 F.2d 371, 375 (2d Cir. 1964).

It is respectfully submitted that the Supreme Court should grant this Petition for Writ of Certiorari and should enforce the foregoing policy enunciated by the Tenth Circuit by reversing that Court's decision below.

III. The Question Presented By The Petition Is One Involving An Important Question Of Law Decided By The Supreme Court To Which The Lower Courts' Decisions Are In Direct Conflict.

The Supreme Court has stated that a court shall not grant an order which will require a party to do that which is impossible. *Virginian Railroad Company v. System Federation*, 300 U.S. 515 (1937); see also, 42 Am.Jur.2d *Injunctions*, § 37 (1969). In this case, the Court of Appeals has ruled that the N.T.D. must comply with the election requirements of Section 401, 29 U.S.C. § 481, applicable to local labor organizations. Such requirements mandate that an election be held once every three years and that notice of such election be mailed to each member at least fifteen days prior to the election. 29 U.S.C. § 481(e).

However, the N.T.D. has demonstrated factually that, because of the constant travelling of N.T.D. members, the N.T.D. cannot conduct an election which would comply with the Secretary's regulations. The evidence stands uncontradicted that the N.T.D. cannot deliver notices of nominations or election ballots to even one-half of its members within the time limits required by the Constitution and the LMRDA. In the only election ever conducted by the N.T.D., that of electing delegates to the 1981 constitution convention, only fifteen percent of the N.T.D. members voted. Yet, the Court of Appeals attempted to dismiss this argument as speculative.

Yet, apparently realizing that the uncontradicted evidence produced by the N.T.D. at trial established this argument to be fact, the Court of Appeals changed gears and noted that even if the argument was true, the Act does not require actual receipt of the notices and ballots by the members—it simply requires that the notices and ballots be sent to all members at their last known addresses.

This statement by the Court of Appeals is most telling. It shows that the Secretary and the Court of Appeals have greatly exalted form over substance. One of the main purposes of the LMRDA is to guarantee free participation in democratic elections for union members. The Appellate Court's decision in this case does nothing toward accomplishing the goal of guaranteeing free participation in democratic elections for N.T.D. members. When an individual has less than a fifty percent chance of even receiving notice of an election, he cannot possibly be considered a full participant in democratic procedures. Indeed, the Court of Appeals appears to be willing to sanction an election where notice was mailed to every union member,

but was received by none. Such a construction of § 481(e) renders attempted compliance with Title IV an exercise in futility.

By requiring the N.T.D. to mail notices to members, who by the transitory nature of their work are unlikely to receive them, the Court of Appeals has opened a flood gate of potential lawsuits brought by individual N.T.D. members who will not receive notice of any election. Cases were brought to the attention of the lower courts where union elections have been held invalid when only a small percentage of members of the union did not receive notice of the election. See e.g. *Wirtz v. Local 169, International Hod Carriers*, 246 F. Supp. 741 (D. Nev. 1965) (Secretary overturned election where 30 members of 512 total members did not receive notice); *Wirtz v. United Brotherhood of Carpenters and Joiners*, 285 F. Supp. 455 (N.D. Cal. 1968) (Secretary overturned election where 382 members of 2700 total members did not receive notice). The uncontradicted evidence in this case shows that most N.T.D. members could not receive the required notices. Thus, the N.T.D.'s inability to hold elections which comply with the Act is not speculative but is, unfortunately, very real.

Notwithstanding the uncontroverted evidence that the N.T.D. could not comply with either the literal requirements of Section 401 of Title IV, 29 U.S.C. § 481, or the spirit of Title IV in guaranteeing free and democratic elections to *all*, assuming that the right to such an election has been established, the District Court and Court of Appeals nonetheless ordered such "compliance". Thus, the mandate is in direct conflict with the Supreme Court ruling that no Court shall issue an order the compliance with which is impossible. Therefore, the decision of the Appellate Court should be reversed.

CONCLUSION

For the aforementioned reasons, it is respectfully requested that this Petition For Writ Of Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

(Filed June 15, 1984)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 82-2104
No. 82-2121

RAYMOND J. DONOVAN,
Secretary of Labor,
Plaintiff-Appellant,
Cross-Appellee,

v.

NATIONAL TRANSIENT DIVISION, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, et al.,
Defendants-Appellees,
Cross-Appellants.

Appeal from the United States District Court
For the District of Kansas
(D. C. Civil Action No. 79-2074)

Steven J. Mandel, Attorney (T. Timothy Ryan, Jr., Solicitor of Labor, Karen I. Ward, Associate Solicitor, Kerry L. Adams, Counsel for Appellate Litigation, and Tedrick A. Housh, Jr., Regional Solicitor, with him on the brief), U.S. Department of Labor, Wash-

ington, D.C., for Plaintiff-Appellant and Cross-Appellee.

Steve A. J. Bukaty of Blake & Uhlig, Kansas City, Kansas, for Defendants-Appellees and Cross-Appellants.

Before McWILLIAMS, LOGAN, and SEYMOUR, Circuit Judges.

LOGAN, Circuit Judge.

The Secretary of Labor brings this action to compel defendant International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, CLC (International) and defendant National Transient Division (NTD) to comply with the requirements of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-531 (LMRDA). NTD, one of five divisions of the International, operates in forty-one states and consists of approximately 8,000 craftsmen who travel throughout the United States erecting steel tanks and related structures. Unlike the other four divisions of the International, NTD has no separate local organizations. Rather, NTD was established by the International Constitution "for the purpose of giving status to and servicing those members who by the transient nature of their employment and their coverage under the NTD Agreement have no fixed permanent place of employment and who thus are unable to carry membership in a Local Lodge or participate in its activities." Pl. Ex. 4. A national director and eight district representatives administer NTD. These officials are appointed by the International president and serve at his pleasure. NTD has never conducted an election of officers, has never adopted and filed with the Secretary a constitution and bylaws, and has never filed any financial reports with the Secretary.

After several NTD members filed a complaint with the Secretary protesting the failure of NTD to conduct an election of officers, the Secretary brought this action. He contends that NTD is a "local labor organization" within the meaning of 29 U.S.C. §§ 402(i), 402(j), and 481(b) and thus has violated 29 U.S.C. § 481(b) by failing to hold an election of officers every three years by secret ballot and 29 U.S.C. §§ 431(a), 431(b), and 437(b) by failing to adopt and file a constitution and bylaws and by failing to file reports with the Secretary. The Secretary alleges that the International violated 29 U.S.C. § 481(e) by failing to ensure that NTD members had the opportunity to nominate and vote for candidates.

After trial, the district court held that NTD is a labor organization within the meaning of 29 U.S.C. § 402(i) and 402(j) and therefore must comply with the reporting and disclosure requirements of the LMRDA. The court concluded, however, that NTD is a "national" rather than a "local" labor organization. Hence, according to the trial court's ruling, NTD must conduct elections of officers at the five-year intervals prescribed by 29 U.S.C. § 481(a) rather than at the three-year intervals prescribed by 29 U.S.C. § 481(b). Defendants appeal, contending that the district court lacked subject matter jurisdiction under 29 U.S.C. § 482(b) and that NTD is not a labor organization for the purposes of the LMRDA. The Secretary cross-appeals, contending that NTD is a local rather than national labor organization for the purposes of 29 U.S.C. § 481.

I

We first address defendants' contention that the district court lacked subject matter jurisdiction under 29 U.S.C. § 482(b). Under 29 U.S.C. § 481, international, national, and local labor organizations must hold periodic

elections of officers by secret ballot. Section 482(a) permits a member of a labor organization to file a complaint with the Secretary alleging a violation of § 481. Section 482(b) provides:

> "The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this subchapter and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization."

Defendants contend that § 482 authorizes the Secretary to bring suit only to set aside an invalid election. They emphasize that § 482(a) states, "*The challenged election* shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide." (emphasis added). Defendants also note that § 482(b) empowers the Secretary to bring an action to "set aside the invalid election." Thus, defendants assert, the text of the statute indicates that the Secretary may not bring an action against NTD under § 482 because NTD has never conducted an election of officers.

Defendants' argument is unpersuasive. Section 482(a) permits a labor organization member to file a complaint "alleging the violation of *any* provision of section 481." (emphasis added). After investigating the complaint, the Secretary may bring a civil action "to set aside the invalid election, *if any.*" 29 U.S.C. § 482(b) (emphasis added). Section 482(c) states that when *"an election has not been held within the time prescribed by section 481* . . . the court shall declare the election, *if any,* to be void and direct the conduct of a new election." (emphasis added). Thus, the text of the statute clearly indicates that Congress contemplated an action pursuant to § 482 when a labor organization fails to conduct an election. Moreover, this construction fully comports with the basic objective of the statute: to guarantee democratic union elections "modeled on 'political elections in this country.'" *Local 3489, United Steelworkers v. Usery,* 429 U.S. 305, 309 (1977) (quoting *Wirtz v. Hotel, Motel & Club Employees Union, Local 6,* 391 U.S. 492, 504 (1968)).

Defendants also rely on a number of cases in contending that the Secretary may not proceed under § 482 unless the labor organization has conducted an election. *Driscoll v. International Union of Operating Engineers, Local 139,* 484 F.2d 682 (7th Cir. 1973), *cert. denied,* 415 U.S. 960 (1974), is illustrative. In *Driscoll,* a union member brought suit before an election challenging the union's practice of requiring every candidate for union office to execute an affidavit stating that he was not a Communist. The court upheld the district court's dismissal of the complaint, in part because § 402 remedies are unavailable until after the union holds the scheduled election. *Id.* at 688.

Driscoll and similar cases are readily distinguishable from the case at bar. Congress limited relief under § 402 to post-election relief when an election is scheduled in order

to prevent individuals or the government from blocking or delaying the election. *See Dunlop v. Bachowski*, 421 U.S. 560, 568-70 (1975); *Calhoon v. Harvey*, 379 U.S. 134, 140 (1964). That policy is not implicated when, as here, the union does not intend to conduct elections. Although courts have not squarely addressed the issue before us, they have upheld actions under § 482 when a union failed to hold an election within the time limits that § 481 prescribes. *See Marshall v. Local Union 1374, International Association of Machinists*, 558 F.2d 1354, 1358 (9th Cir. 1977); *Hodgson v. Union de Empleados de los Supermercados Pueblo*, 388 F. Supp. 1026 (D. P.R. 1974). We therefore hold that § 482 authorizes the Secretary to bring suit against a labor organization that fails to hold periodic elections prescribed by § 481.

II

We next address defendants' assertion that NTD is not a "labor organization" within the meaning of 29 U.S.C. § 402(i). We note at the outset that Congress gave exclusive enforcement authority under Title IV of the Act to the Secretary of Labor in order "to utilize the special knowledge and discretion of the Secretary." *Calhoon v. Harvey*, 379 U.S. at 140. Thus, we must defer to the Secretary's interpretation of the statute "unless there are compelling indications that it is wrong." *E.I. Du Pont de Nemours & Co. v. Collins*, 432 U.S. 46, 55 (1977); *see Cross v. United Mine Workers*, 353 F. Supp. 504, 508 (S.D. Ill. 1973).

Section 402(i) provides in relevant part:

> " 'Labor organization' means a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or

> employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment . . . ."

Defendants argue that many NTD members cannot attend NTD meetings regularly or have substantial direct contact with the organization because of the transient nature of their work. Thus, defendants contend, NTD is not a labor organization subject to the LMRDA because its members do not "participate" in the organization; rather, NTD is merely a "division" of the International.

In order to effectuate the purposes of the Act, Congress defined labor organization broadly "to provide comprehensive coverage of labor organizations engaged *in any degree* in the representation of employees or administration of collective bargaining agreements." S. Rep. No. 187, 86th Cong., 1st Sess. 53, *reprinted in* 1959 U.S. Code Cong. & Ad. News 2318, 2370 (emphasis added); *see also* 29 C.F.R. § 451.2. Thus, if the organization represents its members regarding grievances, labor disputes, or terms or conditions of employment, the organization is subject to the Act regardless of its formal attributes, *see Brennan v. United Mine Workers*, 475 F.2d 1293, 1295-96 (D.C. Cir. 1973); 29 C.F.R. § 451.3, or the extent of its representative activities. *See National Educational Association v. Marshall*, 100 L.R.R.M. (BNA) 2565 (D.D.C. 1979).

The evidence indicates that NTD officials and members negotiate collective bargaining agreements with employers for the benefit of NTD members. Although these agreements are not complete collective bargaining agreements in themselves, they establish standards regarding

labor disputes, grievances, hours, and other terms and conditions of employment. Furthermore, NTD district representatives provide a number of services for NTD members, including handling grievances under the agreement and distributing publications. NTD holds meetings in which its members participate and collects dues from its membership. This evidence clearly shows that NTD is an organization in which employees participate and which represents its members concerning grievances, labor disputes, and other terms and conditions of employment. NTD admits that it is involved in an industry affecting commerce. Accordingly, we hold that NTD is a labor organization within the meaning of § 402(i).

III

The Secretary contends that the trial court erred in concluding that NTD is a "national" rather than a "local" labor organization for the purposes of 29 U.S.C. § 481. Noting that the LMRDA does not define "national" or "local," the district court reasoned that those terms refer to the geographical boundaries of the labor organization. Thus, since NTD operates in forty-one states, the district court held that NTD is a national labor organization. Defendants add that NTD is unable to hold monthly meetings that most NTD members can attend or to operate a hiring hall, two functions that many locals perform. The Secretary, on the other hand, relies on 29 C.F.R. § 452.11. That regulation states that an organizational unit's characterization as a local or national body is "determined by its functions and purposes rather than the formal title by which it is known or how it classifies itself." The Secretary contends that NTD is functionally and structurally a local labor organization notwithstanding the geographical breadth of its operations.

Since the LMRDA defines neither "local" nor "national," we must construe those terms in light of their ordinary meaning, congressional purpose, and the deference accorded to the Secretary's construction of the Act. The typical union structure is a three-tier hierarchy. T. Kheel, *Labor Law* § 3.01 (18 *Business Organizations* 1980). Below the AFL-CIO is the national or international union, which preforms such functions as supervising locals, maintaining legal departments, and providing public relations staffs and liaison offices with government departments. *See id.* at § 3.02[2]. The national or international organization is made up of subordinate locals. Generally, local labor organizations provide day-to-day services to the membership, such as policing collective bargaining agreements, disposing of grievances, collecting membership dues and disciplining dissident members. *See id.* at § 3.03[1]; *Shultz v. Employees' Federation*, 74 L.R.R.M. (BNA) 2140, 2143 (S.D. Tex. 1970). Although a local usually represents workers located within close geographic proximity, it may simply represent workers in a single bargaining unit. *See* A. Goldman, *Labor Law and Industrial Relations in the United States of America* 182-83 (1979).

Congress' purpose in requiring that labor organizations conduct elections under the LMRDA was to ensure that union officers would be responsive to the needs and desires of union members. *See* S. Rep. No. 187, 86th Cong., 1st Sess. 19-20, *reprinted in* 1959 U.S. Code Cong. & Ad. News 2318, 2336. When it required elections every three years for locals but only every five years for national or international organizations, Congress evidently considered it especially important to ensure the accountability of those officials with whom union members have the most direct contact. Thus, it makes little sense to focus exclusively on

the geographical proximity of the organization's membership in determining whether a labor organization is a local within the meaning of § 481. Rather, congressional intent indicates that the focus should be on the relationship between the organization and its members. Accordingly, we agree with the Secretary that we must focus on NTD's functions and structure in order to determine whether it is a local or a national labor organization.

Given its structure and functions, we find no reason to reject the Secretary's characterization of NTD as a local labor organization. NTD is subordinate to the International and has no subordinate organizational units. Thus, it has the relatively simple organizational structure characteristic of local labor organizations. *See Shultz v. Employees' Federation*, 74 L.R.R.M. (BNA) at 2143. It pays a "per capita" tax to the International, which is a tax locals typically pay to their parent national or international organizations. *See King v. Randazzo*, 234 F. Supp. 388, 394 (E.D.N.Y. 1964), *aff'd* 346 F.2d 307 (2d Cir. 1965). Most important, NTD performs the functions of a local. NTD officials negotiate the basic terms of collective bargaining agreements, ensure that those agreements are enforced, handle grievances, collect dues from members, maintain out-of-work lists, hold meetings at which members express their views, and provide a number of other services directly to NTD members. We therefore find that NTD is functionally and structurally a local labor organization.

IV

Finally, defendants contend that NTD should be exempt from the election requirements of 29 U.S.C. § 481 because it is unable to comply with those provisions. Specifically, defendants contend that the transience of

NTD members renders NTD unable to comply with § 481 (e), which requires the labor organization to mail notice of an election to each member within fifteen days before the election.

Defendants' argument is unconvincing. Section 481(b) requires each local to conduct officer elections at least once every three years. If it fails to do so, § 482(c) requires the court to direct an election supervised by the Secretary. The LMRDA contains no exception for instances in which compliance with these requirements is difficult, and we are unwilling to imply one given the clear congressional mandate. *Cf. Wirtz v. Local Union No. 1622*, 285 F. Supp. 455, 465 (N.D. Cal. 1968) (Congress did not give courts the power to determine whether election would serve the public interest). Moreover, defendants have not shown that NTD is unable to comply with the Act's election provisions. Section 481(e) merely requires that the labor organization mail notice of the election to its members at their last known home address; it does not require that the notice actually reach them. NTD presently manages to elect delegates to the International convention and to collect dues from its members. Thus, NTD's inability to hold elections complying with the LMRDA is speculative at best.

We affirm the opinion of the district court insofar as it held that it had subject matter jurisdiction over this action and that NTD is a labor organization within the meaning of 29 U.S.C. § 402(i). We reverse that portion of the district court's opinion holding that NTD is a national labor organization subject to 29 U.S.C. § 481(a) because we conclude that NTD is a local labor organization for the purposes of 29 U.S.C. § 481(b).

AFFIRMED IN PART and REVERSED IN PART.

APPENDIX B

(Filed July 15, 1982)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CIVIL ACTION No. 79-2074

RAYMOND J. DONOVAN, Secretary of Labor,
United States Department of Labor,
Plaintiff,

v.

NATIONAL TRANSIENT DIVISION, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, et al.,
Defendants.

MEMORANDUM AND ORDER

This is an action brought by the Secretary of Labor under the Labor-Management Reporting & Disclosure Act, 29 U.S.C. §401, *et seq.* [hereinafter "LMRDA"] for a judgment directing defendant International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, CLC [hereinafter "International"] to insure that defendant National Transient Division [hereinafter "NTD"] of the International conducts an election of officers under plaintiff's supervision and files and maintains records with the Secretary. A trial to the Court was held on this matter on June 6, 7 and 8, 1982. Following submissions and arguments by the parties, the

Court makes the following findings of fact and conclusions of law.

Defendant NTD is one of five divisions of the International as established by the International constitution. Unlike the other four divisions, NTD has no local organizations. Rather, NTD was established for the purpose of giving status to those members who, by transient nature of their jobs, have no fixed place of employment, and who, thus, are not able to carry membership in a local lodge or participate in its activities.

The NTD is administered by a national director and eight district representatives who report directly to the national director. These officials are appointed by the International president to serve at his pleasure. The district representatives supervise the activities of the NTD in their respective regions nationwide except for those areas covered by the Nine Western States Field Construction Agreement. These officials, together with other NTD members, negotiate a collective bargaining agreement known as the NTD Articles of Agreement for the benefit of the NTD membership. This agreement covers such matters as labor disputes, grievances, hours and other terms or conditions of employment. The NTD Agreement is not a complete collective bargaining agreement in itself, as it relies upon the International and local agreements for wage compensation and other employee benefits.

The NTD consists of approximately eight thousand members, nation-wide, who travel throughout the United States and other countries working on the construction of steel tanks and related structures. NTD members perform highly skilled and specialized boilermaker crafts. Testimony throughout the trial was consistent that these workers are highly-motivated, efficient craftsmen who

take pride in their work. Hired and trained directly by the NTD employers, members travel from job to job with their individual employers. Maintaining traveling crews specialized in the industry allows the NTD contractor to accurately predict his costs because he knows the skills and abilities of his employees and he does not have to certify members on each job. At trial, the plea of the contractors was not to change the efficient operation of the union.

On May 31, 1978, some members of NTD protested to the international president about the failure of NTD to elect its own officers. When the International president's response failed to satisfy them, the members appealed their grievance to the International Executive Council. Failing to get a final decision from the International within three months, the complainants filed a complaint with the Labor Department. The Secretary filed this action on March 29, 1979.

The Court has previously ruled upon the matter of jurisdiction in its Memorandum and Order on the motion for summary judgment. Defendants have presented no new arguments in support of their contention that the Court does not have jurisdiction over this action; therefore, the Court finds that jurisdiction is proper.

The issues before the Court are whether defendant NTD is a "labor organization" within the meaning of 29 U.S.C. §402(i) and (j), and whether it is a local labor organization as used in 29 U.S.C. §481. Section 402, Title 29, United States Code, provides, in part:

> "(i) 'Labor organization' means a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or

employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization, other than a State or local central body.

"(j) A labor organization shall be deemed to be engaged in an industry affecting commerce if it—

• • •

"(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

• • •

"(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

"(5) is a conference, general committee, joint or system board, or joint council, subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection, other than a State or local central body."

To fall within the ambit of this chapter, a "labor organization" must deal with an employer and act as representative of employees of an employer. *Local 1498, Am. Fed. of G. Emp. v. American Fed. of G. Emp.*, 522 F.2d 486 (3rd Cir. 1975). The fact that an organization or division does not have its own constitution does not preclude it from being a "labor organization" under the LMRDA. *Roddy v. United Transp. Union*, 479 F.Supp. 57 (N.D. Ala. 1979), *aff'd.* 608 F.2d 522 (5th Cir. 1979). Similarly, the fact that the division is merely an administrative arm of the International does not prevent it from being classified as a "labor organization" in its own right if it meets the criteria set by the LMRDA. *Cross v. United Mine Workers of America*, 353 F.Supp. 504 (S.D. Ill. 1973); *Monborne v. United Mine Workers of America*, 342 F.Supp. 718 (W.D. Pa. 1972). Here, the NTD deals directly with the employers who become signatories to the NTD Articles of Agreement. The NTD district representatives handle grievances under the NTD Articles of Agreement for NTD members. Defendants do not dispute that the NTD is an organization engaged in an industry affecting commerce under the definition of 29 U.S.C. §402(j). Therefore, under the terms of 29 U.S.C. §402(i), NTD is a "labor organization."

Defendants, who offer little resistance to the categorization of NTD as a "labor organization," seriously dispute plaintiff's contention that NTD is a "local" labor organization. The term "local" is not defined within the LMRDA. Plaintiff asserts that the similarity of functions between generally-recognized locals and NTD in the areas of handling grievances and collecting dues establish NTD as a "local." Treaties define a local as a basic unit which extends to employers in a defined geographical area. *See* Bok and Dunlop, *Labor in American Community*, 150

(Simon and Schuster, 1970); Goldman, *Labor Law and Industrial Relations in the U.S.A.*, 182 (1979); Sloane and Witney, *Labor Relations*, 3d Ed. 1971 (Prentice Hall, Inc. 1977). The evidence points out that NTD is not a local labor unit. The word "national" in its title clearly defines the geographical boundaries of NTD. The transient nature of the work necessitated the shift of NTD from a Chicago local to a national organization. Despite the similarities in function, the Court cannot find that NTD is a "local" labor organization.

Accordingly, the Court finds that NTD is a national labor organization and must comply with the requirements of the LMRDA as they apply to national labor organizations. The Court would note that, in making this finding, it does not imply that any prejudice has resulted from the present method of appointing officers, merely that such a procedure is prohibited by the LMRDA.

Defendants have made various arguments that NTD could not hold elections, and thus the Court cannot order them to comply with the Act. Such arguments are without merit as to a determination that NTD must follow the provisions of the Act. *See Monborne v. United Mine Workers of America, supra,* 342 F.Supp. 718. Congress has determined that labor organizations must hold elections and make certain reporting requirements. It is not within the Court's province to exempt a labor organization from following the LMRDA requirements because compliance is difficult. Such arguments would be more appropriately taken before the Congress.

Further, the Court finds that defendants have made no argument that a national election is impossible. Such elections, outside the initial election, would be no more difficult than the present International election. In fact, the two elections could be held jointly.

In addition, the Court finds no merit to defendants' argument that elections and reporting will destroy the NTD. There is simply no evidence to show that elected officers will in any way change the structure or purpose of the labor organization as it is now run by appointed officers. The only difference is that the officers and representatives will be responsive to the members themselves, as opposed to only the International president.

IT IS BY THE COURT THEREFORE ORDERED that judgment is hereby entered for plaintiff in accordance with the foregoing. IT IS FURTHER ORDERED that the National Transient Division of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, CLC is a national labor organization subject to the provisions of the Labor-Management Reporting & Disclosure Act, 29 U.S.C. §401, *et seq.*, and must act in accordance with those provisions under the supervision of the Secretary of Labor.

IT IS SO ORDERED.

DATED: This 15th day of July, 1982, at Kansas City, Kansas.

/s/ Dale E. Saffels
Dale E. Saffels
United States District Judge

APPENDIX C

(Filed December 31, 1981)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CIVIL ACTION No. 79-2074

RAY MARSHALL, Secretary of Labor, United States Department of Labor,
Plaintiff,

v.

NATIONAL TRANSIENT DIVISION, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, et al.,
Defendants.

MEMORANDUM AND ORDER

This matter comes before the Court upon plaintiff's motion for summary judgment, plaintiff's motion for leave to file an amended complaint, and defendants' motion to dismiss. Defendants have questioned the Court's jurisdiction under the Labor-Management Reporting & Disclosure Act, 29 U.S.C. §481, *et. seq.* [hereinafter the Act]. The Court will consider those arguments first.

Defendants allege that the Court lacks jurisdiction over the subject matter raised in Count I, that Count I cannot be properly brought under Title IV of the Act, and that Count I fails to state a cause of action. The assertions are all based upon the language of 29 U.S.C. §482(b), which reads:

> "(b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this subchapter and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization."

In support of their motion, defendants rely on cases involving questions of whether a suit is properly brought by a private union member or the Secretary of Labor, and whether a pre- or post-election suit is proper. The cases cited by defendants have not considered the issue of whether the Secretary may bring an action when no election has been held.

The Court agrees with counsel that this is a case of first impression. In a somewhat similar case, *Marshall v. Local U. 1374, Int. Ass'n of Mach.*, 558 F.2d 1354 (9th Cir. 1977), the Court held that 29 U.S.C. §481(b) was violated where the incumbents were automatically re-elected when a quorum was not obtained at the nomination meeting. No question was considered on the Secretary's authority to bring an action under §482(b) on grounds which have been raised in the case *sub judice*. In *Tam v. Rutledge*, 475 F.Supp. 559 (D. Hawaii 1979), Chief Judge King held that the Secretary could proceed against the union to

bring about an election despite the imposition of a trusteeship over the local union.

These cases, though not on point, lead us to conclude that the Secretary may bring an action under §482 to enforce the provisions of §481(b), which require elections to be held every three years. We find further support in the language of §482(b), "to set aside the invalid election, *if any.*" [Emphasis added.] Congress obviously contemplated that at certain times, no election would be held and the Secretary would be required to bring suit "to direct the conduct of an election." §482(b). Further, such an interpretation supports the basic objective of Title IV of the Act, as stated in *Steelworkers v. Usery*, 429 U.S. 305 (1977):

> ". . . The basic objective of Title IV of the LMRDA is to guarantee 'free and democratic' union elections modeled on 'political elections in this country' where 'the assumption is that voters will exercise common sense and judgment in casting their ballots.' [*Wirtz v. Hotel Employees*, 391 U.S. 492 (1968)] 391 U.S., at 504. Thus, Title IV is not designed merely to protect the right of a union member to run for a particular office in a particular election. 'Congress emphatically asserted a vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member.' *Wirtz v. Bottle Blowers Assn.* [389 U.S. 463 (1968)], at 475; *Wirtz v. Laborers' Union* [389 U.S. 477 (1968)], at 483. The goal was to 'protect the rights of rank-and-file members to participate fully in the operation of their union through processes of democratic self-government, and, through the election process, to keep the union leadership responsive to the membership.' *Wirtz v. Hotel Employees, supra,* at 497."

429 U.S. at 309.

In addition, this interpretation does not contravene the purposes of Congress in naming the exclusive post-election remedy as that of the Secretary's:

> "'. . . Congress made suit by the Secretary the exclusive post-election remedy for two principal reasons: (1) to protect unions from frivolous litigation and unnecessary judicial interference with their elections, and (2) to centralize in a single proceeding such litigation as might be warranted . . . .', *Trbovich v. Mine Workers*, 404 U.S. 528, 532 (1972). '. . . Congress intended to prevent members from pressing claims not thought meritorious by the Secretary, and from litigating in forums or at times different from those chosen by the Secretary.' *Id.*, at 536. . . ."

Dunlop v. Bachowski, 421 U.S. 560, 569-70 (1975).

We therefore conclude that defendants' motion to dismiss must be denied.

Plaintiff seeks an order allowing him to amend the complaint against the defendants. The Court finds that defendants will not be prejudiced by the proposed amendments, nor will additional discovery be necessitated. Therefore, plaintiff's motion to amend will be granted.

Plaintiff further seeks summary judgment in his favor. The Court is familiar with the standards governing a summary judgment motion. Such a motion is to be denied unless the moving party demonstrates entitlement to it beyond a reasonable doubt. *Madison v. Deseret Livestock Co.*, 574 F.2d 1027, 1037 (10th Cir. 1978); *Mustang Fuel Corp. v. Youngstown Sheet & Tube Co.*, 516 F.2d 33, 36 (10th Cir. 1975). The Court must examine all the evidence in the light most favorable to the party opposing the motion. *Mogle v. Sevier County School Dist.*, 540 F.2d

478, 482 (10th Cir. 1976), *cert. denied* 429 U.S. 1121 (1977); *Frey v. Crankel*, 361 F.2d 437, 442 (10th Cir. 1966). The summary judgment remedy is a drastic one, and should be applied with caution in order to preserve a litigant's right to trial. *Machinery Center, Inc. v. Anchor National Life Insurance Company*, 434 F.2d 1, 6 (10th Cir. 1970).

Although we are generally impressed with the position of plaintiff, we cannot say as a matter of law that no genuine factual issues remain. Particularly, the Court believes that factual issues remain concerning whether defendant National Transient Division is a *local* labor organization. Therefore, plaintiff's motion for summary judgment will be denied.

The Court finds, in light of these rulings, that the trial of this matter should be continued from the trial calendar of January 4, 1982, to the trial calendar of February 8, 1982.

IT IS BY THE COURT THEREFORE ORDERED that defendants' motion to dismiss is hereby denied. IT IS FURTHER ORDERED that plaintiff's motion to amend is hereby granted. IT IS FURTHER ORDERED that plaintiff's motion for summary judgment is hereby denied. IT IS FURTHER ORDERED that this case be and hereby is continued from the trial calendar of January 4, 1982, until and to the trial calendar of February 8, 1982.

DATED: This 31st day of December, 1981, at Kansas City, Kansas.

/s/ Dale E. Saffels
Dale E. Saffels
United States District Judge

APPENDIX D

(Filed July 26, 1984)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MAY TERM—June 15, 1984

Before Honorable Robert H. McWilliams, Honorable James K. Logan, and Honorable Stephanie K. Seymour, circuit Judges

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Nos. 82-2104 and 82-2121
(D.C. No. Civ. 79-2074)

RAYMOND J. DONOVAN, Secretary of Labor,
U. S. Department of Labor,
Plaintiff-Appellant,
Cross-Appellee,

vs.

NATIONAL TRANSIENT DIVISION, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, CLC, and INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, CLC,
Defendants-Appellees,
Cross-Appellants.

This cause came on to be heard on the record on appeal from the United States District Court for the .... District of Kansas, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is *affirmed in part. The judgment is reversed in part. The cause is remanded to the United States District Court for the District of Kansas for further proceedings in accordance with the opinion of this court.*

Howard K. Phillips, Clerk

By /s/ Robert L. Hoecker
Robert L. Hoecker

APPENDIX E

MAY TERM—July 13, 1984

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges

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No. 82-2104
82-2121

RAYMOND J. DONOVAN, Secretary of Labor,
U.S. Department of Labor,
Plaintiff-Appellant,
Cross-Appellee,

vs.

NATIONAL TRANSIENT DIVISION INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, etc., et al,
Defendants-Appellees,
Cross-Appellants.

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by Appellees/Cross-Appellants in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and

no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ Howard K. Phillips
Howard K. Phillips, Clerk

APPENDIX F

RELEVANT PROVISIONS OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT

Section 3(i) "Labor organization" means a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization, other than a State or local central body.

• • •

BILL OF RIGHTS OF MEMBERS OF LABOR ORGANIZATIONS

Title I, Sec. 101(a)(1) Equal rights. Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

• • •

Title I, Sec. 102 Civil action for infringement of rights; jurisdiction

Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

• • •

Title II, Section 201(a) Adoption and filing of constitution and bylaws; contents of report. Every labor organization shall adopt a constitution and bylaws and shall file a copy thereof with the Secretary, together with a report, signed by its president and secretary or corresponding principal officers, containing the following information—

(1) the name of the labor organization, its mailing address, and any other address at which it maintains its principal office or at which it keeps the records referred to in this title;

(2) the name and title of each of its officers;

(3) the initiation fee or fees required from a new or transferred member and fees for work permits required by the reporting labor organization;

(4) the regular dues or fees or other periodic payments required to remain a member of the reporting labor organization; and

(5) detailed statements, or references to specific provisions of documents filed under this subsection which

contain such statements, showing the provision made and procedures followed with respect to each of the following: (A) qualifications for or restrictions on membership, (B) levying of assessments, (C) participation in insurance or other benefit plans, (D) authorization for disbursement of funds of the labor organization, (E) audit of financial transactions of the labor organization, (F) the calling of regular and special meetings, (G) the selection of officers and stewards and of any representatives to other bodies composed of labor organizations' representatives, with a specific statement of the manner in which each officer was elected, appointed, or otherwise selected, (H) discipline or removal of officers or agents for breaches of their trust, (I) imposition of fines, suspensions, and expulsions of members, including the grounds for such action and any provision made for notice, hearing, judgment on the evidence, and appeal procedures, (J) authorization for bargaining demands, (K) ratification of contract terms, (L) authorization for strikes, and (M) issuance of work permits. Any change in the information required by this subsection shall be reported to the Secretary at the time the reporting labor organization files with the Secretary the annual financial report required by subsection (b).

Title II, Section 201(b) Annual financial report; filing; contents. Every labor organization shall file annually with the Secretary a financial report signed by its president and treasurer or corresponding principal officers containing the following information in such detail as may be necessary accurately to disclose its financial condition and operations for its preceding fiscal year—

(1) assets and liabilities at the beginning and end of the fiscal year;

(2) receipts of any kind and the sources thereof:

(3) salary, allowances, and other direct or indirect disbursements (including reimbursed expenses) to each officer and also to each employee who, during such fiscal year, received more than $10,000 in the aggregate from such labor organization and any other labor organization affiliated with it or with which it is affiliated, or which is affiliated with the same national or international labor organization;

(4) direct and indirect loans made to any officer, employee, or member, which aggregated more than $250 during the fiscal year, together with a statement of the purpose, security, if any, and arrangements for repayment;

(5) direct and indirect loans to any business enterprise, together with a statement of the purpose, security, if any, and arrangements for repayment; and

(6) other disbursements made by it including the purposes thereof;

all in such categories as the Secretary may prescribe.

* * *

Title II, Section 407(b) Each person required to file a report under section 201(b), 202, 203(a), the second sentence of 203(b), or section 211 shall file such report within ninety days after the end of each of its fiscal years; except that where such person is subject to section 201(b), 202, 203(a), the second sentence of 203(b), or section 211, as the case may be, for only a portion of such a fiscal year (because the date of enactment of this Act occurs during such person's fiscal year or such person becomes subject to this Act during its fiscal year) such

person may consider that portion as the entire fiscal year in making such report.

* * *

Title II, Section 210 Civil action for enforcement by Secretary; jurisdiction

Whenever it shall appear that any person has violated or is about to violate any of the provisions of this title, the Secretary may bring a civil action for such relief (including injunctions) as may be appropriate. Any such action may be brought in the district court of the United States where the violation occurred or, at the option of the parties, in the United States District Court for the District of Columbia.

* * *

Title IV, Sec. 401(a) Officers of national or international labor organizations; manner of election. Every national or international labor organization, except a federation of national or international labor organizations, shall elect its officers not less often than once every five years either by secret ballot among the members in good standing or at a convention of delegates chosen by secret ballot.

Title IV, Sec. 401(b) Officers of local labor organizations; manner of election. Every local labor organization shall elect its officers not less often than once every three years by secret ballot among the members in good standing.

* * *

Title IV, Sec. 401(e) Nomination of candidates; eligibility; notice of election; voting rights; counting and publication of results; preservation of ballots and records. In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof. Not less than fifteen days prior to the election notice thereof shall be mailed to each member at his last known home address. Each member in good standing shall be entitled to one vote. No member whose dues have been withheld by his employer for payment to such organization pusuant to his voluntary authorization provided for in a collective bargaining agreement shall be declared ineligible to vote or be a candidate for office in such organization by reason of alleged delay or default in the payment of dues. The votes cast by members of each local labor organization shall be counted, and the results published, separately. The election officials designated in the constitution and bylaws or the secretary, if no other official is designated, shall preserve for one year the ballots and all other records pertaining to the election. The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this title.

* * *

Title IV, Sec. 402(a) Filing of complaint; presumption of validity of challenged election. A member of a labor organization—

(1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or

(2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation,

may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 401 (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

Title IV, Sec. 402(b) Investigation of complaint; commencement of civil action by Secretary; jurisdiction; preservation of assets. The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this title has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of

this title and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization.

Title IV, Sec. 402(c) Declaration of void election; order for new election; certification of election to court; decree; certification of result of vote for removal of officers. If, upon a preponderance of the evidence after a trial upon the merits, the court finds—

(1) that an election has not been held within the time prescribed by section 401, or

(2) that the violation of section 401 may have affected the outcome of an election,

the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization. The Secretary shall promptly certify to the court the names of the persons elected, and the court shall thereupon enter a decree declaring such persons to be the officers of the labor organization. If the proceeding is for the removal of officers pursuant to subsection (h) of section 401, the Secretary shall certify the results of the vote and the court shall enter a decree declaring whether such persons have been removed as officers of the labor organization.

Title IV, Sec. 402(d) Review of orders; stay of order directing election. An order directing an election, dismissing a complaint, or designating elected officers of a labor organization shall be appealable in the same manner as the final judgment in a civil action, but an order directing an election shall not be stayed pending appeal.

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No. 84-548

In the Supreme Court of the United States

OCTOBER TERM, 1984

NATIONAL TRANSIENT DIVISION,
INTERNATIONAL BROTHERHOOD OF BOILERMAKERS,
ETC., AFL-CIO, ET AL., PETITIONERS
v.
RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 402(b) of the Labor-Management Reporting and Disclosure Act of 1959 authorizes the Secretary of Labor to bring suit to compel a labor organization that has failed to hold required periodic elections to conduct an election under the supervision of the Secretary.

2. Whether the National Transient Division is a "local labor organization" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 and therefore required to comply with the mandatory election provisions of the Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 736 F.2d 618. The opinion of the district court (Pet. App. A12-A18) is reported at 542 F. Supp. 957. The pretrial opinion of the district court (Pet. App. A19-A23) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1984. A petition for rehearing was denied on July 13, 1984 (Pet. App. A26-A27). The petition for a writ of certiorari was filed on October 3, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner National Transient Division, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO (NTD), is one of five divisions of the International, a labor organization maintaining its principal office in Kansas City, Kansas (Pet. App. A2, A13). NTD operates in 41 states and consists of approximately 8,000 members who travel throughout these states erecting steel tanks and related structures (*id.* at A2). NTD was established pursuant to the International constitution "for the purpose of giving status to and servicing those members who by the transient nature of their employment * * * have no fixed permanent place of employment and who thus are unable to carry membership in a Local Lodge or participate in its activities" (*ibid.*).

Unlike the other four divisions of the International, NTD has no separate local organizations (Pet. App. A2). Rather, it is administered solely by a national director and eight district representatives, all of whom are appointed by and responsible to the International president (*ibid.*). These officials service NTD members in the various districts across the country (*id.* at A7-A8, A10, A13). Together with other NTD members, these officials negotiate a collective bargaining agreement known as the NTD Articles of Agreement, which covers such matters as labor disputes, grievances, hours, and other basic terms and conditions of employment (*id.* at A7-A8, A13).[1] Moreover, NTD representatives administer and enforce the Articles of Agreement (*id.* at A8, A10). They handle grievances, hold meetings in which members participate, maintain out-of-work referral lists, resolve health and welfare problems, and distribute publications (*id.* at A8, A10; Tr. 152-153). NTD also

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[1]The NTD Articles of Agreement do not include wage provisions (Pet. App. A13).

collects monthly dues from its members, which are "increased in the same amount and as of the same date as any increase in the Local Lodge monthly dues" (Pet. App. A8, A10; Def. Exh. B at 82). Finally, as a "subordinate bod[y]," NTD is required to pay a monthly "per capita" tax to the International (Pet. App. A10; Def. Exh. B at 49).

Despite the foregoing, NTD has never held an election of its officers, adopted and filed a constitution and bylaws, or filed any financial reports with the Secretary of Labor (Pet. App. A2). See 29 U.S.C. 431(a) and (b), 481.

2. On May 31, 1978, several NTD members in good standing protested to the International president about the failure of NTD to conduct an election of officers (Pet. App. A14). After failing to receive a final decision from the International within three calendar months, they filed a timely complaint with the Secretary of Labor (*ibid.*). The Secretary brought this action in the United States District Court for the District of Kansas, pursuant to the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 440 and 482(b), to require NTD to hold a supervised election of officers and to maintain and file required documents. The Secretary alleged that NTD is a "local labor organization" and thus required to elect officers once every three years by secret ballot. See 29 U.S.C. 481(b). NTD took the position that it is not a "labor organization" subject to the provisions of the Act and, in any event, that it is not a "local" labor organization.

After a trial on the merits,[2] the district court held that NTD is a "national," but not a "local," labor organization subject to the LMRDA. The court acknowledged the "similarities in function" between NTD and generally recognized locals but, based on the nationwide jurisdiction of

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[2]The district court denied the Secretary's motion for summary judgment and petitioners' motion to dismiss (Pet. App. A19-A23).

the union, it concluded that NTD is a "national." The court ordered NTD to elect its officers at least once every five years, either by direct secret ballot or at a convention of delegates chosen by secret ballot (Pet. App. A14-A17). See 29 U.S.C. 481(a).[3] Both NTD and the Secretary appealed.

3. The court of appeals affirmed the district court's ruling that NTD is a "labor organization," but reversed the holding that it is a "national" rather than a "local" union (Pet. App. A1-A11). The court first held that 29 U.S.C. 482(b) authorizes the Secretary to bring suit against a labor organization that fails to hold required periodic elections. The court of appeals, like the district court (Pet. App. A14, A19-A23), rejected NTD's argument that 29 U.S.C. 482(b) authorizes the Secretary to bring suit only to set aside an invalid election, but not to compel an election that has not been conducted. Pet. App. A3-A6. The court of appeals next determined that NTD is a "labor organization" because it "is an organization in which employees participate and which represents its members concerning grievances, labor disputes, and other terms and conditions of employment" (*id.* at A6-A8).

The court of appeals further held, however, that NTD is "structurally and functionally" a "local" labor organization (Pet. App. A8-A10). It noted that NTD has the relatively simple organizational structure characteristic of locals and pays a "per capita" tax to the International, like other locals (*id.* at A10). The court found most important the fact that "NTD performs the functions of a local," including negotiating and enforcing a collective bargaining agreement (*ibid.*). Finally, the court rejected NTD's claim that, as a practical matter, it could not hold an election, noting that

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[3]A local, by contrast, must elect officers at least once every three years by direct secret ballot. 29 U.S.C. 481(b).

compliance with the LMRDA's election provisions is mandatory (*id.* at A10-A11). Accepting the district court's findings on this question (*id.* at A17-A18), the court of appeals concluded that NTD had not shown that it is unable to comply with the election requirements (*id.* at A11).

ARGUMENT

Petitioners themselves characterize (Pet. 23) this case as one of "first impression" under the LMRDA, and clearly there is no conflict between the decision below and any decision of this Court or of another court of appeals. The decision of the court of appeals correctly resolves issues of statutory interpretation, and therefore there is no reason for review by this Court.

1. Petitioners contend (Pet. 11-15) that the Secretary lacks authority to bring a Title IV suit, pursuant to 29 U.S.C. 482(b), where a union has failed to hold periodic elections as required by the Act. This argument is wholly without merit.

The plain language of Title IV unambiguously authorizes the Secretary to file suit in a situation, such as this, where an election has never been held or scheduled. This language is dispositive. See *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982); *United States* v. *Turkette*, 452 U.S. 576, 580 (1981). Section 481(b) requires that "[e]very local labor organization shall elect its officers not less often than once every three years by secret ballot among the members in good standing." Section 482(a) provides that "[a] member of a labor organization * * * may file a complaint with the Secretary * * * alleging the violation of *any* provision of section 481" (emphasis added). While petitioners have contended (see Pet. App. A4) that the statute is addressed to the Secretary's power to correct an invalid election, it manifestly does not concern itself exclusively with that situation. Section 482(b) provides that the Secretary, after

investigation, may bring a civil action "to set aside the invalid election, *if any*" (emphasis added). Finally, 29 U.S.C. 482(c) specifically states that if the court finds that "an election has not been held within the time prescribed by section 481 * * * the court shall declare the election, *if any*, to be void" (emphasis added).

In addition, the court of appeals correctly observed that construing the statute to authorize this suit "comports with the basic objective of the statute[] to guarantee democratic union elections" (Pet. App. A5). In light of this statutory background, several courts have entertained suits brought under Title IV to remedy the failure of a union to hold periodic elections. See *Marshall* v. *Local 1374, Int'l Ass'n of Machinists,* 558 F.2d 1354, 1358 (9th Cir. 1977); *Tam* v. *Rutledge,* 475 F. Supp. 559, 572 (D. Hawaii 1979); *Hodgson* v. *Union de Empleados de los Supermercados Pueblo,* 388 F. Supp. 1026, 1028-1029 (D.P.R. 1974).[4]

Petitioners' suggestion (Pet. 12-15) that an LMRDA Title I suit would be the appropriate vehicle for vindicating the electoral rights involved here is not persuasive. Their statement that Title IV is not available because "Title IV does not require elections" (Pet. 14-15) is clearly contrary to the statute. See 29 U.S.C. 481; *Local No. 82, Furniture Moving Drivers* v. *Crowley,* No. 82-432 (June 12, 1984), slip op. 11-12. Indeed, the Court recently held that,

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[4]Petitioners' attempt to distinguish *Local Union 1374* and *Supermercados Pueblo* on the ground that, in those cases, "the right to have an election had already been established" (Pet. 13-14), is unavailing. In those cases, like the instant case, the Secretary successfully secured the Title IV remedy of a supervised election in instances in which a local union had failed to hold an election every three years. That the unions in those cases apparently did not ultimately contest that they were "labor organizations" is irrelevant to the jurisdictional question whether the Secretary has the power to institute a suit when an election has not been held, for whatever reason, within the statutory time period.

if the remedy sought for an LMRDA election violation is a supervised election, "union members must utilize the remedies provided by Title IV." *Local No. 82*, slip op. 23. That is the remedy sought here. Moreover, it is questionable whether a suit challenging the failure to hold an election even raises a Title I cause of action since the focus of the Title I election provision is to prohibit discrimination among members. See *Calhoon* v. *Harvey*, 379 U.S. 134, 138-141 (1964). Thus, a Title IV suit is the appropriate means to obtain the statutory remedy sought in this case.

2. Petitioners also challenge (Pet. 15-19) the lower courts' rulings that NTD is a "labor organization" within the meaning of the LMRDA. This contention is insubstantial. Indeed, the district court noted that petitioners offered "little resistance" to this categorization (Pet. App. A16).

A "labor organization" is defined as "any organization of any kind * * * in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment." 29 U.S.C. 402(i). To assure that the LMRDA's objectives are not circumvented, it is established that the definition of "labor organization" should be read broadly. See 29 C.F.R. 451.2; S. Rep. 187, 86th Cong., 1st Sess. 52-53 (1959); H.R. Rep. 741, 86th Cong., 1st Sess. 28 (1959); *NEA* v. *Marshall*, 100 L.R.R.M. (BNA) 2565 (D.D.C. 1979).

Petitioners argue (Pet. 16-18) that NTD is not a "labor organization" because its members do not "participate" in the entity. To the contrary, the uncontroverted evidence supports the court of appeals' determination that NTD members participate in their union in every manner short of electing its officers. Specifically, NTD National Director David Lewis testified that NTD meetings in which members

participate are held in the various districts (Pet. App. A8, A10; Tr. 63-64). NTD members take part in negotiations over the NTD Articles of Agreement (Pet. App. A7; Tr. 64-65), and pay dues to NTD (Pet. App. A10). Clearly, NTD correctly was held to be a labor organization.[5]

3. The LMRDA classifies all labor organizations as either "national," "local," or "intermediate." 29 U.S.C. 481(a), (b), and (d). Petitioners contend (Pet. 19-26) that the court of appeals erred in classifying NTD as a "local." [6] While the terms "local" and "national" are not defined in the LMRDA, the Secretary's interpretative regulations, which are entitled to deference (*NLRB* v. *Bell Aerospace Co.* 416 U.S. 267, 273-274 (1974)), provide that the status of a labor organization should be determined primarily on the basis of its

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[5]Petitioners also contend (Pet. 19, 24) that NTD is merely an administrative arm or division of the International. It is well settled under the LMRDA, however, that the fact that an organization is viewed as an administrative arm or division of an International does not mean that it is not a "labor organization," as long as it deals with employers. See, *e.g., Usery* v. *Int'l Org. of Masters*, 550 F.2d 826 (2d Cir. 1977); *Brennan* v. *U.M.W.A.*, 475 F.2d 1293, 1296 (D.C. Cir. 1973). Petitioners rely (Pet. 24) solely on *Illinois Malleable Iron Co.*, 127 N.L.R.B. 1509 (1960), enforcement denied on other grounds *sub nom. NLRB* v. *Appleton Electric Co.*, 296 F.2d 202 (7th Cir. 1961), a decision under the National Labor Relations Act that predates the above-cited LMRDA decisions. However, in that case the NLRB specifically found that the entity involved did not engage in any collective bargaining activities. 127 N.L.R.B. at 1510.

Petitioners' reliance (Pet. 22) on the fact that the government has never characterized the other divisions of the International as "labor organizations" is irrelevant. Even assuming arguendo that consistency required that those divisions be classified the same as NTD, were the issue to arise, the Secretary has never received an election complaint concerning the other divisions (Tr. 49-50), and therefore it has never had the authority to investigate and determine their status. See 29 U.S.C. 482.

[6]Petitioners do not suggest how NTD should be classified if it is found to be a labor organization. Indeed, they assert (Pet. 19) that NTD cannot be placed in any of the three categories.

purposes and the functions it performs on behalf of its members. 29 C.F.R. 452.11. Applying this analysis, the court of appeals correctly concluded that "NTD is functionally and structurally a local labor organization" (Pet. App. A10).

Structurally, NTD clearly is a local. It is subordinate to the International and, at the same time, has no union entities below it. Indeed, the International constitution establishes NTD as a subordinate unit — a subdivision of the International — that sends delegates to the International convention, has officials appointed by and responsible to the International president, and pays a "per capita" tax to the International.[7] Finally, NTD lacks the complex structure of an international or national body, which typically include separate autonomous units. NTD is run by a national director who has district officials representing him in various regions. These representatives have no authority to act except with the approval of the national director. This non-complex structure is typical of a local labor organization. See *Shultz* v. *Employees' Federation,* 74 L.R.R.M. (BNA) 2140, 2143 (S.D. Tex. 1970).

Functionally, NTD also operates as a local. As the court of appeals found (Pet. App. A10), NTD performs the duties generally associated with locals. It negotiates terms of employment with contractors, handles grievances, maintains referral lists, and collects dues. In providing these and other direct services to the membership and in being the unit most immediately involved with the members' welfare, NTD unquestionably more closely resembles a local than a national. See *Shultz* v. *Employees' Federation,* 74

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[7]Such a tax has been described in another context as "one which is levied by a parent labor organization upon a *local* union with which it is affiliated." *King* v. *Randazzo,* 234 F. Supp. 388, 394 (E.D. N.Y. 1964), aff'd, 346 F.2d 307 (2d Cir. 1965) (emphasis in original).

L.R.R.M. at 2143; see generally 1 T. Kheel, *Labor Law* §§ 3.02[2], 3.03[1] (1984). To classify NTD as anything other than a local labor organization, though it is structured and functions like a local, would undercut the purposes of the statute. If NTD is not a local, its members would be the only members of the Boilermakers who could not vote, every three years, for the union officials who determine most directly their conditions of employment.

In enacting the LMRDA, Congress was addressing "a need to protect the rights of rank-and-file members to participate fully in the operation of their union through processes of democratic self-government, and, through the election process, to keep the union leadership responsive to the membership." *Wirtz* v. *Hotel Employees Union, Local 6*, 391 U.S. 492, 497 (1968). As a result, Congress prescribed minimum standards for union elections, including provisions governing how often and in what manner elections must be conducted. By setting more stringent standards for the election of local union officers (triennial secret ballot elections) than for national officers, Congress decreed that members be given a more frequent opportunity to have the union officials closest to them held accountable through the elective process. See *Labor Management Reform Legislation: Hearings on H.R. 3540, et al., Before the Joint Subcomm. of the House Comm. on Education and Labor*, 86th Cong., 1st Sess. 644 (1959) (statement of Rep. Griffin). A failure to treat NTD as a local would undermine that policy.

Contrary to petitioners' contention (Pet. 19-20), neither the migratory nature of the work nor the lack of monthly meetings militates against a finding that NTD is a local union. Transitory work patterns among local members are far from unprecedented. See, *e.g.*, *Usery* v. *Int'l Org. of Masters*, 550 F.2d 826 (2d Cir. 1977); *Shultz* v. *Radio Officers' Union*, 344 F. Supp. 58, 60, 69 (S.D. N.Y. 1972). Thus, the court of appeals recognized that "it makes little

sense to focus exclusively on the geographical proximity of the organization's membership in determining whether a labor organization is a local" (Pet. App. A9-A10).[8] By the same token, NTD's lack of monthly meetings cannot override the more significant functional and structural characteristics of the union.[9] In fact, NTD does hold periodic meetings of its members, even if not as frequently as do other Boilermaker locals (*id.* at A8, A10). Accordingly, the court of appeals correctly held that NTD was required by statute to hold triennial elections. In doing so, the court did not seek to rewrite the International's constitution, as petitioners suggest (Pet. 25), but simply ordered that an election be conducted in conformity with the constitution, "so far as lawful and practicable" (H.R. Rep. 741, *supra*, at 17). See 29 U.S.C. 482(c).

4. Petitioners renew their argument (Pet. 26-28) that the Secretary is not entitled to the relief of a supervised election because there is no proof that NTD can conduct an election of officers. This contention was correctly rejected by both courts below (Pet. App. A10-A11, A17-A18).

The election requirements and remedies of the LMRDA contain no exception for instances in which compliance may be difficult. See 29 U.S.C. 481(b), 482(c); S. Rep. 187, *supra*, at 21; H.R. Rep. 741, *supra*, at 17. In any event, the court of appeals found that petitioners "have not shown that NTD is unable to comply with the Act's election provisions" (Pet. App. A11). The court noted that NTD continues to collect dues from its members and has conducted

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[8]While petitioners correctly note (Pet. 24-25) that the court in *Shultz v. Employees' Federation*, *supra*, referred to the fact that the union there operated within a limited geographic area, the court relied primarily on the union's structural and organizational characteristics discussed above. See [redacted] L.R.R.M. at 2143-2144.

[9]Monthly meetings, of course, are not required by the LMRDA.

elections for delegates to the International convention (*ibid.*). Against this background and in light of the absence of any attempt to conduct a local election, the argument that it is impossible for NTD to elect its officers is unsupported speculation.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1984

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[10]Petitioners incorrectly characterize the evidence as showing that NTD cannot deliver ballots to even "one-half" of its members (Pet. 27-28). To the contrary, the evidence demonstrates that in the 1981 election of International convention delegates, approximately 10 % of the nomination ballots were returned by the post office to the union as undelivered (Tr. 173-174), and approximately 6 % of the election ballots were returned as undelivered (Tr. 175-176).